'What if I ...?'

The questions most frequently presented to an ethics attorney

Marc Garfinkle, New Jersey Law Journal

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In an ethics practice, where virtually all callers are attorneys, we hear certain questions with surprising frequency. There may be value in repeating them and discussing them here. If you have no such concerns, dear reader, please be patient, and let this column empower you. Let it help you to inform or assist a colleague who may be laboring under a misapprehension or misunderstanding of the law. Please read on, despite your having no skin in the game, because you probably have a friend who does.

What if I bounce a trust check?

Commingling client funds or having a negative trust balance even for a minute will get a lawyer in trouble. How much trouble depends on what is revealed by the subsequent investigation. Overdrafts are often the result of human error, an incorrect bank code or sloppy, non-existent or non-conforming recordkeeping by the lawyer. There is no de minimis offense. The clarion call of any bounced trust check will bring the hounds.

Overdrawn trust checks invariably result in an audit of all Attorney Trust Account and Attorney Business Account books and records including ledgers, canceled checks and bank statements for a specified period of time. The nature and size of the attorney's practice, particularly the frequency and nature of trust transactions, may dictate the length of time under review or the selection of the venue for the audit. Sometimes the auditor will allow a "mail-in." Other times s/he will come to the respondent's office. Some audits can be scheduled at the office of the respondent's attorney or accountant. Sometimes, the audit will be at the Office of Attorney Ethics headquarters in Ewing. The OAE is practical in this regard.

Of course, if the attorney believes that the audit might reveal knowing or unexplained misappropriation or commingling of client funds, an audit may have particularly profound ramifications. Counsel's focus shifts from saving the attorney's license to keeping her out of prison.

Most audits are less grim because most attorneys are honest. More than a few are terrible bookkeepers, however. Bad bookkeeping may invite criticism and even discipline, but sloppy books from an honest, competent lawyer is not likely to result in suspension of the lawyer's license. Even if a lawyer's books and recordkeeping are horrible, and the trust account has never been "three-way reconciled," counsel need not despair. Asked nicely, the auditor will normally allow time for the attorney to have even the messiest or sparsest books and records updated, organized, reconciled and prepared in a way that will facilitate review. Note, however, that only a bookkeeper or accountant who

has experience with attorney trust accounts should be consulted. Lawyers should consult with ethics counsel whenever they have notice of an audit.

What if I don't have a written retainer agreement with my client?

This question often arises when an attorney wants to sue a client for fees. Sometimes the random audit for compliance, discussed above, brings the question to light. Sometimes it arises in the course of an ethics violation. Whatever the reason, attorneys are often asked to produce for the OAE a client file, including the retainer agreement. Surprisingly, many attorneys are still not using them. Despite the mandate of the RPCs, we continue to represent clients without written retainer agreements.

Under the Model Rules, adopted in most states, the scope of the representation and the basis for the fee must be communicated to the client "preferably in writing" prior to or within a short time after the representation commences. The New Jersey rule is less equivocal; here, there must be a confirmation in writing. Lawyers who practice in other states as well as New Jersey, are sometimes surprised by the difference. "RPC 1.5 (Fees) … (b) When the lawyer has not regularly represented the client, the basis or rate of the fee *shall be communicated in writing* to the client before or within a reasonable time after commencing the representation."

As the OAE sees it, the retainer agreement is the heart of the attorney-client communication process, immortalizing the terms upon which both parties may rely. As I see it, the agreement is a simple and wonderful device that limits the scope of the attorney's responsibility and states the attorney's fee and the basis therefor. Without a written agreement, it would be difficult to enforce any claim for fees.

The "writing" can be as informal as an email or a scrap of note paper. It should be sent to the client before much work has been done by the attorney, and before any prejudice can arise to a client who may dispute the terms. It can be as simple as:

Hi, Jane. It was a pleasure meeting you today. As discussed, I will handle your municipal court matter in Gotham. You have paid my initial retainer of $750, which will cover my fee for preparation and one court appearance. Additional appearances will be at the same rate. You will be responsible for out-of-pocket costs such as experts' fees and discovery as they come due; mileage will be charged at $.40 per mile. You understand that I may send my associate in my place. Please let me know if you have questions about this.

Form letters are sufficient, but it is advisable to retain a copy signed by the client or other proof of receipt.

Matrimonial retainer agreements and some contingent fee agreements have terms which have been dictated by the Supreme Court and which appear as Appendices to the Rules. Attorneys who practice in the relevant fields are expected to know them and use them. Failure to do so may involve violation of Court Rules, in addition to ethics issues. Those types of cases aside, however, attorneys may usually create any fee agreement with a client, provided the fee is reasonable per RPC 1.5(a), and that the client has been advised in writing of the fee or attorney's rate or other basis for the fee. This had been held to mean that the attorney must specifically advise the client of every fee or cost for which the client will be, or may ultimately become, responsible to pay.

An attorney's failure to have a written retainer agreement may result in discipline under RPC 1.5(b). However, if no other violations are found, the violation may be found to be minor, and discipline of little consequence. Often, though, these violations are found in situations reflecting unreasonable fees, overreaching and other violations of the Rules. These cases may involve severe discipline. Again, counsel should seek counsel.

What if I have unidentifiable moneys in trust?

Another question often spawned by the Notice of Audit or by sleepless nights, this one is also surprising for its frequency. Uncounted numbers of attorneys, even large firms, are carrying positive balances in trust for years, or even decades, because they don't know whose money it is or because they have lost track of the rightful owner or because they never got around to tying the loose ends. Sometimes, the amounts are small escrows retained from a business transaction or real estate closing, and which, for a host of reasons, have never been released. Other times the attorney is holding five- or six-figure amounts of untraceable, or untraced funds for years and years and years, and no one has ever come looking for them.

Fortunately, Rule 1:21-6(j) provides a protocol to be followed by attorneys holding "Unidentifiable and Unclaimed Trust Fund Accumulations and Trust Funds Held for Missing Owners." Assuming there were no shenanigans with the money while it was held in trust, the protocol does *not* require the specialized expertise of ethics counsel. The Rule pertains to funds held in trust for over two years. It compels the attorney to designate the funds (the trust sub-account) as Unidentifiable or Unclaimed and to perform due diligence during the following year to establish the identity or whereabouts of the beneficial owner. The money may then be deposited with the Clerk of the Superior Court who will hold the sums in trust for the beneficial owners pending an order of the Supreme Court concerning its disposition.

All applicants should heed the final words of the Rule: "All applications … under this section shall be supported by a detailed affidavit setting forth specifically the facts and all reasonable efforts of search, inquiry and notice. The Clerk … may decline to accept funds where the petition does not evidence diligent search and inquiry or otherwise fails to conform with this section."

An attorney whose negligence, lack of diligence or non-conforming bookkeeping resulted in unidentified trust funds may be disciplined for those violations. However, the OAE will look with favor upon even the most belated applications under R. 1:21-6(j) if the attorney establishes true due diligence and demonstrates an understanding of the Rules that will prevent a recurrence of the violations.

There you have it, dear reader: my most common questions.•

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Health Care Law

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